Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION *et al.*,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.,

Respondent.

No. 492

MARLON D. GREEN,

Petitioner,

vs.

CONTINENTAL AIR LINES, INC.,

Respondent.

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and AMERICAN JEWISH COMMITTEE as *AMICI CURIAE*

BERNARD NATH
Chicago, Illinois
GILBERT GOLDSTEIN
Denver, Colorado
ARNOLD FORSTER
New York, New York
Attorneys for
Anti-Defamation League of B'nai B'rith
515 Madison Avenue
New York 22, New York

ELY M. AARON
Chicago, Illinois
CHARLES ROSENBAUM
Denver, Colorado
EDWIN J. LUKAS
New York, New York
Attorneys for
American Jewish Committee
165 East 56th Street
New York 22, New York

Amici Curiae

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
Of Counsel

INDEX

TABLE OF AUTHORITIES

Cases:

Statutes:

Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION *et al.*,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.,

Respondent.

No. 492

MARLON D. GREEN,

Petitioner,

vs.

CONTINENTAL AIR LINES, INC.,

Respondent.

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and AMERICAN JEWISH COMMITTEE as *AMICI CURIAE*

INTEREST OF THE *AMICI*

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of more than three hundred and fifty thousand men and women and their families. The Anti-Defamation League was or-

ganized, in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States.

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto * * *

The above entitled matter is one for review of the proceedings and an order of the Colorado Anti-Discrimination Commission directing Continental Air Lines, Inc. to give Marlon D. Green the first opportunity to enroll in its training school for pilots. That order was based on a finding that Continental, having refused to employ Green as an air line pilot because he was a Negro, had violated the Colorado Anti-Discrimination Act of 1957. Continental thereupon sought court review of the Commission's order. The District Court set aside the Commission's cease and desist order and dismissed the complaint on the ground that Continental as an interstate carrier was not subject to the prohibitions of the Colorado Anti-Discrimination Act. The Supreme Court of Colorado affirmed, and this Court granted the petition for a writ of certiorari.

Both the Anti-Defamation League and the American Jewish Committee are gravely concerned with the issues and outcome of this case. One of their primary purposes

is to combat racial and religious prejudice in the United States through the elimination of discrimination against Jews as well as all other racial, religious and ethnic groups which comprise our American people, and to advance good will and mutual understanding and respect among all racial, religious and ethnic groups. Both organizations hold that the welfare and security of Jews in the United States are inseparably related to the preservation of equality of opportunity for all persons; that any denial of such opportunity to members of any racial, religious, or ethnic group is a threat to the status and security of all groups and the individual members thereof.

In keeping with those objectives, the Anti-Defamation League and the American Jewish Committee approve of state legislation against discrimination in employment such as the Colorado Anti-Discrimination Act of 1957, and they support energetic enforcement thereof. They believe that, if the rulings of the courts below are permitted to stand, an important segment of American industry—all interstate carriers and possibly all enterprises engaged in interstate commerce—could evade the mandate of state laws against discrimination in employment. Such a result, in the opinion of the two organizations, is not warranted by the pertinent provisions of the federal Constitution and the acts of Congress, and would greatly weaken and might even stultify the effectiveness of some 21 state laws against discrimination in employment.

The Anti-Defamation League of B'nai B'rith and the American Jewish Committee filed a joint brief as *amici curiae* in this case in the Supreme Court of Colorado. This brief is filed with the consent of the parties.

STATEMENT OF THE CASE

Marlon D. Green, in a complaint to the Colorado Anti-Discrimination Commission, charged that Continental Air Lines, Inc. refused to employ him as a commercial airline pilot solely because he was a Negro, thereby violating the Colorado Anti-Discrimination Act of 1957. Continental denied that it had violated the Act and questioned the jurisdiction of the Commission and the constitutionality of the Act.

The parties to the Commission proceeding entered into a stipulation that Continental was engaged in interstate commerce and that the position of pilot sought by Green involved interstate operations.

The Commission thereupon entered an order requiring Continental to cease and desist from its discriminatory employment practices and give Green the first opportunity to enroll in its training school. Continental filed a petition in the District Court of the City and County of Denver, seeking judicial review of the Commission's order. It alleged that the Colorado Anti-Discrimination Act, as applied to it on the facts in this case, was unconstitutional and void under the provisions of Article I, Section 8, Clause 3 of the United States Constitution, which empowers Congress to regulate commerce among the several states.

District Judge William A. Black held that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier. Accordingly, he set aside the findings of the Anti-Discrimination Commission and dismissed the complaint. From that decision the Anti-Discrimination Commission and Green appealed to

the Supreme Court of Colorado which, on February 13, 1962, affirmed the District Court decision. *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.* —— Colo. ——, 268 P. 2d 970. This Court granted the petition for a writ of certiorari on October 8, 1962.—— U. S. ——, 83 S. Ct. 26(3).

THE ISSUE

The issue in this case is whether under federal legislation passed pursuant to the Commerce Clause (Article I, Section 8, Clause 3 of the Federal Constitution) or under the Commerce Clause itself, the State of Colorado is barred from enacting legislation which prohibits interstate carriers operating in the state from discriminating against employees or applicants for employment because of race, creed, color, national origin or ancestry.

SUMMARY OF ARGUMENT

Neither existing federal legislation nor the Commerce Clause of the United States Constitution prevents the State of Colorado from prohibiting discrimination in employment by interstate carriers operating within the state. Congress has not enacted any legislation evidencing a clear intent to pre-empt the field of discrimination in employment by air carriers operating in interstate commerce. In the absence of such clear congressional intent, the state is free to legislate on that subject under its police power, provided that such state regulation does not impose an undue burden on commerce.

State legislation prohibiting employment discrimination in no way burdens commerce. It is completely consistent with established national public policy and functions to facilitate rather than restrict interstate commerce.

Furthermore, the presumption of constitutionality should operate to sustain the Colorado statute.

ARGUMENT

The State of Colorado is not barred by existing federal legislation or by the Commerce Clause of the United States Constitution from prohibiting discrimination in employment by interstate carriers operating in Colorado.

The authority of the state to pass legislation against discrimination based on race, religion, color, ancestry or national origin is not an issue in this case. There is no dispute as to the power of the Colorado legislature under its police power to enact legislation prohibiting discriminatory practices in the state. That power stems from the responsibility of the state to protect the health, safety, morals, well being and tranquility of its people. In fact this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883) said that discriminatory acts by individuals were "within the domain of the State Legislature." The victim of discriminatory conduct was directed by this Court to "resort to the laws of the State for redress." See also, *Nebbia* v. *New York*, 291 U. S. 502 (1934); *Breard* v. *City of Alexandria*, 341 U. S. 622, 640 (1951).

In the leading case of *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (1945), this Court upheld state legislation

against discrimination based on race, religion or ethnic origin as a proper exercise of the police power. The provision there in dispute was Section 43 of the New York Civil Rights Law. That section prohibits labor organizations from refusing membership to an applicant because of race, creed or color or from denying members equal treatment on the same grounds. Civil and criminal sanctions are provided by Section 41 of the same statute. The labor organizations contended that the New York Civil Rights Law violated the Due Process Clause of the Fourteenth Amendment by depriving the organization of its right to select its members and by abridging its property rights and liberty of contract.

This Court rejected that contention, saying:

> We have here a prohibition of discrimination in membership or union service on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees (326 U. S. at 93-94).

Mr. Justice Frankfurter in a concurring opinion said:

> * * * it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim

> devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the constitution itself exacts. *Id.*, at 98.[1]

In 1953 this Court had another occasion to deal with the question of the constitutionality of legislation against discrimination. In *District of Columbia* v. *Thompson*, 346 U. S. 100, it held that a District of Columbia civil rights ordinance prohibiting discrimination in restaurants constituted a legitimate exercise of the police power vested in the local legislative authority which adopted that ordinance. This Court said:

> Certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. *Id.*, at 109.

While not disputing the power of the State of Colorado to enact legislation against discrimination in employment and to vest enforcement jurisdiction in the Colorado Anti-Discrimination Com ssion, the District Court in its deci-

1. *Railway Mail ssociation* v. *Corsi* will be discussed further *infra*, at pages 28-30.

sion, affirmed by the Supreme Court of Colorado, held that under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3), such state legislation could not constitutionally be extended to cover interstate carriers. The Colorado Anti-Discrimination Act of 1957, by its terms, applies to all employers of six or more employees within the state, excepting only certain religious organizations and associations, irrelevant to this case. Since Continental admittedly employs more than six employees within the state, the decisions of the Colorado state courts properly reached the constitutional issue, whether under the United States Constitution the Colorado Anti-Discrimination Act may be applied to Continental, which concededly is an interstate air carrier. Those courts answered that question in the negative by holding the Colorado statute, insofar as it purports to govern the conduct of interstate carriers, to be unconstitutional under the Commerce Clause which vests jurisdiction over interstate commerce in the Congress.[2]

In reaching that conclusion, the District Court reasoned: 1) that Congress pre-empted the field of discrimination in employment by interstate carriers and 2) that the Colorado Anti-Discrimination Law conflicts with the overriding federal concern in the area of interstate commerce and hence imposes an undue burden on such commerce.

The Supreme Court of Colorado, in its opinion affirming the District Court, expressed complete approval of the District Court's reasoning. "The findings, conclusions and judgment of the trial court might well be adopted *in toto* as the opinion of this court." Transcript of Record, fol.

2. The Congress shall have power * * * to regulate Commerce with foreign Nations and among the several States * * * United States Constitution, Art. I, Sec. 8, Cl. 3.

644, p. 293. The Supreme Court of Colorado then proceeded to discuss a number of decisions of this Court which it said "control the result." Those decisions, however, bear only on the second ground mentioned above. We will discuss both grounds in this brief.[3]

A. Congress did not pre-empt the field of discrimination in employment by interstate carriers.

Fair employment practice bills have been introduced in every Congress since 1942. Invariably, such bills would have prohibited discrimination in employment on the grounds of race, religion, color, national origin or ancestry by employers, employment agencies and labor organizations. "Employer" necessarily has been defined in these bills as a person engaged in commerce, trade, traffic, transportation or communication among the several states or between any state and any place outside thereof.[4]

No such legislation has been enacted by the Congress. While one such bill passed the House of Representatives, it did not receive the concurrence of the Senate (H. R. 4453, 81st Cong., 2d Sess.). For a legislative history and analysis of efforts to pass fair employment practice legislation, see: Hearings Before the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., pp. 407-

3. The decision of the Supreme Court of Colorado in this case was discussed in 110 *U. of P. Law Rev.* (May 1962) 1033; 62 *Col. Law Rev.* (Nov. 1962) 1348; and 76 *Harvard Law Rev.* (Dec. 1962) 404. Each of the comments disagreed with the conclusions reached by the court below.

4. E.g. S. 1258, 87th Cong., 1st Sess., introduced March 8, 1961 by Senators Humphrey, Burdick, Douglas, Gruening, Javits, Long (Hawaii), Long (Missouri), McCarthy, Morse, Neuberger, Pastore and Young (Ohio); Secs. 3(b), 3(c), and 5

423. Had federal fair employment practice legislation been passed by the Congress, it would have prohibited discrimination in employment by interstate carriers such as Continental, and in that event perhaps a plausible argument could have been made for the proposition that Congress intended to pre-empt the field. In the absence of such legislation, however, such a contention is baseless.

The doctrine of congressional pre-emption has always been regarded as predicated upon congressional intent. It is justified by the constitutional plan under which Congress is assigned power to regulate interstate and foreign commerce (Art. I, Sec. 8, Cl. 3) and therefore has the power to determine in which field relating to such commerce it wants to reserve for itself the exclusive power of legislation. "[I]n each case the question is one of congressional intent." *Guss* v. *Utah L. R. B.*, 353 U. S. 1, 10 (1957).

This Court in a leading case said:

> Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766 (1945) and cases cited therein. See also, *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611 (1926).

The opinion of the District Court, affirmed by the Supreme Court of Colorado, relied upon three federal laws as the basis for its statement that "Congress has legislated extensively [sic] in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states

• • • • [5] 1) The Railway Labor Act (45 U. S. C. A., Secs. 151, 181, *et seq.*); 2) The Civil Aeronautics Act (49 U. S. C. A., Secs. 401 *et seq.*); and 3) The Interstate Commerce Act (49 U. S. C. A., Secs. 1, 301, 901, 1001, *et seq.*). We will discuss those statutes in order.

1. Railway Labor Act

The purposes of the Railway Labor Act are set forth in 45 U. S. C. A., Sec. 151a as follows:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Nowhere in those purposes can be found language that indicates a congressional intent or effort to deal with the problem of discrimination in employment by interstate carriers based on race or color, nor do any of the other provisions of the Railway Labor Act undertake to deal with such discrimination.

---

5. Transcript of Record, fol. 564, p. 263.

The District Court cited a line of cases beginning with *Steele* v. *Louisville and Nashville R. R. Co.*, 323 U. S. 192 (1944), in support of its conclusion that the Railway Labor Act covers racial and religious discrimination by employers against employees. In *Steele*, this Court held "that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race." *Conley* v. *Gibson*, 355 U. S. 41, 42 (1957). The Court quite properly reasoned that when by statute the federal government designates a labor organization as the exclusive bargaining agent for a "craft or class of employees," such grant of power is accompanied by a corresponding duty on the agent to represent fairly all members of such "craft or class of employees" and not to discriminate against some because of their race or color. The rationale of those decisions is that the union or bargaining agent cannot be permitted to practice discrimination against the employees whom it is granted exclusive authority to represent, since otherwise the grant of exclusive bargaining power could be misused to oppress members of minority groups.

Those cases deal with the problem of discrimination by labor unions; employers were involved in some of those actions only insofar as they cooperated with the unions to make their racial discrimination effective, *e.g.*, *Brotherhood of R. R. Trainmen* v. *Howard*, 343 U. S. 768 (1952). No provision of the Railway Labor Act has yet been interpreted by this Court as imposing a direct obligation upon the employing railroads to refrain from discrimination against their employees, let alone applicants for employment. The fallacy of the District Court's argument is apparent when one speculates what would have been the

complainant's prospects had he attempted to use the Railway Labor Act to charge Continental Air Lines with an unlawful employment practice.

None of the cases cited by the District Court for their holdings under the Railway Labor Act supports the interpretation that Congress by enacting that statute evidenced an intention to pre-empt the field of discrimination in employment in interstate commerce. The purpose of the Act is to regulate the relationship between carriers and exclusive bargaining agents and it is only within the context of that relationship that this Court dealt with the subject of racial discrimination by such bargaining agents. The Railway Labor Act, like its prototype, the Labor Relations Act, was intended to and does in fact deal only with one type of discrimination — by employers against employees on the grounds of membership or non-membership in a labor union. It does not cover or purport to cover discrimination by an employer against his employees or prospective employees on the grounds of race or color.

It was expressly to cover that field of employer-employee relationships that the fair employment practice bills discussed above were introduced in Congress.

2. *Civil Aeronautics Act*

The "discrimination" proscribed by the Civil Aeronautics Act (and its superseding Federal Aviation Program Act, 49 U. S. C. A. (Supp.) Secs. 1301 *et seq.*) is discrimination in service provided by air lines to their customers either by the use of preferential rates or by prejudicial treatment of passengers. 49 U. S. C. A., Sec. 402 (c) spells out the over-all policy of the Act as "the promotion of adequate, economical and efficient *service* by

air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." (Emphasis added.) Section 484 (b) of the Act expressly describes the kinds of discrimination prohibited. It declares that it is unlawful for any air carrier to:

> • • • make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The identical language appears in Section 1374(b) of the Federal Aviation Program Act. The prohibitions against discriminatory conduct are limited to discrimination in service or against passengers.

Section 484(b) was applied in a case in which Pan American World Airways was charged with racial discrimination against four Negro passengers. The United States Court of Appeals for the Second Circuit said that Section 484(b) "is for the benefit of persons, including passengers, using the facilities of air carriers." *Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499, 501 (1956). Clearly, discriminatory treatment of passengers on airplanes is directly related to "service" which the Civil Aeronautics Act and the Federal Aviation Program Act were intended to regulate and control.

None of the cited sections of those Acts reflects an intention by Congress to include the field of employment discrimination within the scope of its concern.

The reliance of the District Court on those sections of the Act can be attributed only to a failure to distinguish between discrimination against passengers with respect to service and discrimination against employees or would-be employees with respect to employment.

Nor can an intention on the part of Congress to pre-empt the field of discrimination in employment be inferred from 49 U. S. C. A., Secs. 551-560, also cited by the District Court. Those sections comprise subchapter VI of the Civil Aeronautics Act which is headed "Civil Aeronautics Safety Regulations," and obviously have no bearing on the problem of employment discrimination.

The general regulatory and investigative powers which the statute gives to the Civil Aeronautics Board in Section 425 can be exercised only to carry out its functions and duties under the Act. Since the Act does not evince a congressional intent to regulate or control employment discrimination by air carriers, Section 425 cannot provide such authority.

An examination of the cases cited in the opinion of the District Court to support its pre-emption argument with respect to the Civil Aeronautics Act fails to disclose a single case in which the Act was held applicable to employment discrimination by air carriers. For example, the Court cited *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 132 F. Supp. 871 (1955) in which the Village of Cedarhurst, Long Island was held to be powerless to regulate air flights over its territory because federal aeronautics statutes have pre-empted that aspect of air commerce. It is difficult to see how such a decision buttresses the proposition that Congress, by enacting the Civil Aeronautics Act, intended to pre-empt the field of employment discrimination.

3. *Interstate Commerce Act*

By its terms, the Interstate Commerce Act does not apply to air carriers. 49 U. S. C. A., Secs. 1, *et seq.*, cover the transportation of passengers or property "wholly by railroad, or partly by railroad and partly by water * * *." Secs. 301, *et seq.* cover "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *." Secs. 901, *et seq.* cover "the transportation by water in interstate or foreign commerce of passengers or property * * *." Secs. 1001, *et seq.* cover "freight forwarders."

In any case, the Interstate Commerce Act does not presume to deal with discrimination in employment. 49 U. S. C. A., Sec. 3 (1) contains a provision making it unlawful for any "common carrier," as defined in the statute, "to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *." That section by its terms applies to discrimination in service and was held by this Court to prohibit discrimination by rail carriers against passengers. *Henderson* v. *United States*, 339 U. S. 816 (1950); *Mitchell* v. *United States*, 313 U. S. 80 (1941). That section has never been held applicable to employment discrimination.

4. *Executive Orders*

The District Court sought to find support for its claim of federal pre-emption by reference to Executive Orders, No. 10479, August 13, 1953, and No. 10557, September 3, 1954. Both of those orders have since been superseded by

Executive Order No. 10925, promulgated by President Kennedy on March 8, 1961—26 F. R. 1977. That order, like its predecessors, requires all federal departments, agencies and corporations to insert in their contracts and agreements a clause by which the contractor undertakes not to engage in discrimination in employment in connection with work or services to be performed under the contract. The order also sets forth machinery to insure performance of the contractual obligation. Executive Order No. 10925, like its predecessors, did not and could not impose a statutory obligation upon government contractors or subcontractors not to discriminate in employment on grounds of race. An employer who does not enter into a government contract is under no legal obligation not to discriminate. The obligation of an employer who enters into a government contract containing a non-discrimination clause is purely contractual. That technique is necessary because of the absence of any federal legislation imposing a statutory obligation upon employers engaged in commerce not to discriminate in their employment policies. It is the absence of such federal legislation which negates the argument that the Congress has pre-empted the field.

Furthermore, an executive order is not an act of Congress and consequently cannot serve to establish any congressional intent which is the basis for the pre-emption doctrine.

Thus, we see that the Railway Labor Act, the Civil Aeronautics Act and the Interstate Commerce Act did not, and the various Executive Orders discussed above could not, evidence a congressional intent to pre-empt the field of discrimination in employment by employers engaged in commerce. Of course, Congress could have pre-empted the

field by enacting a federal fair employment practice law with a statement of intention to bar the application of state legislation to interstate commerce. But to date, as noted above, Congress has not taken such action. See also, *Railway Mail Association* v. *Corsi*, *supra*, at 97.

Assuming *arguendo*, that a congressional intent to regulate racial or religious discrimination in employment by interstate air carriers could be read into one or more of the federal acts discussed above, such regulation could only take the form of a prohibition on discrimination.[6] Such a federal regulation would not evince a "congressional purpose incompatible" with the purpose of the Colorado Anti-Discrimination Law since both would seek to prohibit racial and religious discrimination in employment. A finding of such incompatibility is necessary before a state statute may be ruled to be superseded by a federal measure dealing with the same subject matter. *De Veau* v. *Braisted*, 363 U. S. 144, 153 (1960). Certainly, if the objective of a congressional measure were to eliminate discrimination in employment, a state fair employment practice act would not constitute a "frustration" of congressional policy. *Ibid.*

Such state and federal measures, far from contradicting each other and thus precluding both from functioning together, would supplement each other as do state and federal labor relations acts. *Ibid.* See also, *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749-50 (1942); *Buck* v. *California*, 343 U. S. 99, 102, and cases there cited (1952).

6. A federal act requiring such discrimination would violate the 5th Amendment which this Court has said includes a guarantee of equal protection of the laws. *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954); *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948).

B. There is no conflict between the Colorado anti-discrimination law and the federal concern in the area of interstate commerce.

The absence of federal legislation evidencing a clear intent to pre-empt the field of discrimination in employment in interstate commerce does not end our inquiry. State legislation affecting interstate commerce may be barred by the Commerce Clause of the United States Constitution even though Congress has not spoken on the subject-matter of such state legislation.

In seeking to determine whether the Commerce Clause, in the absence of federal legislation, bars state regulation, the courts have long recognized that the several states may regulate matters of local concern over which federal authority has not been exercised (*Cooley* v. *Bd. of Wardens*, 12 How. 299, 320 (1851), even though the state regulation may have some impact on interstate commerce. State laws, such as "quarantine measures, game laws, and like local regulations of rivers, harbors, piers and docks" have been sustained "even though they materially interfere with interstate commerce." That applies particularly to measures which "must be applied alike to intrastate and interstate traffic." *Southern Pacific Co.* v. *Arizona, supra*, 783. "The only requirements consistently recognized have been that the [state] regulation not discriminate against * * * interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." *Cities Service G. Co.* v. *Peerless O. and G. Co.*, 340 U. S. 179, 186-7 (1950); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 40 (1948).

1. The interest of the state of Colorado in preventing discrimination in employment and the national interest

For many years, the State of Colorado has pursued a consistent policy against racial and religious discrimination. That interest in granting every citizen equal opportunity has found expression in a number of legislative enactments. Law of 1895, prohibiting discrimination in places of public accommodation, resort or amusement; Law of 1917, prohibiting discriminatory advertising; Law of 1953, prohibiting discrimination in employment; Anti-Discrimination Act of 1957; the Colorado Fair Housing Act of 1959.[7]

The Anti-Discrimination Act of 1957 is the statute at issue in this case. It bars discrimination based on race, creed, color, national origin or ancestry by employers against employees or applicants for employment. Its prohibition is directed against discriminatory practices carried on by employers within the State of Colorado. The Colorado Anti-Discrimination Commission was set up to administer that law. In the exercise of its jurisdiction, the Commission found that Continental engaged in discriminatory and unfair employment practices in Colorado against Green and thus violated the Colorado Anti-Discrimination Act.

There is certainly no national policy opposed to the state interest in preventing discriminatory employment practices within the State of Colorado; rather, the con-

7. Recently upheld by the Supreme Court of Colorado as a legitimate exercise of the state's police power. *Colorado Anti-Discrimination Commission, et al.* v. *Case, et al.*, Docket No. 19988, —— Colo. ——, decided December 17, 1962.

trary is true. A large number of states have enacted laws against discrimination in employment, in places of public accommodation, education, housing, etc. *1961 United States Commission on Civil Rights Report*, Vol. 1, pp. 208-210, Table 1. Such legislation has been upheld by this Court as a proper exercise of the state's police power. *Railway Mail Association* v. *Corsi, supra; District of Columbia* v. *Thompson, supra.*

The interest of the State of Colorado in preventing discriminatory employment practices within the state does not conflict with any "national interest which overrides the interest of [Colorado] to forbid the type of discrimination practiced here." *Bob-Lo Excursion Co.* v. *Michigan, supra*, at 40. On the contrary, the objective of the Colorado Anti-Discrimination Act—elimination of racial and religious discrimination—is also a national objective. The public policy of the United States is clearly directed against racial and religious discrimination in all its aspects. That policy, which may "be ascertained by reference to the laws and legal precedents," *Muschany* v. *U. S.*, 324 U. S. 49, 66 (1945), finds expression not only in the Fifth and Fourteenth Amendments, but also in the Civil Rights Statutes enacted in 1866, 14 Stat. 27; 1867, 14 Stat. 546; 1870, 16 Stat. 140; 1871, 17 Stat. 13; 1875, 18 Stat. 335; 1957, 71 Stat. 634; and 1960, 74 Stat. 86; and in numerous Executive Orders, including E. O. No. 11063 prohibiting discrimination in federally-aided housing, issued November 20, 1962, as well as the Executive Orders discussed *supra*. Of the many decisions of this Court recognizing and enforcing that public policy, it is sufficient to note *Bolling* v. *Sharpe, supra*, and *Hurd* v. *Hodge, supra.*

Hence, the Colorado Anti-Discrimination Act "safeguard[s] an obvious state interest"—the interest to bar

discriminatory employment practices—and there is no "national interest • • • in the prevention of [such] state restrictions." *Cities Service G. Co.* v. *Peerless O. and G. Co., supra,* at 186-7. That Act contains "nothing out of harmony, much less inconsistent, with our federal policy." *Bob-Lo Excursion Co.* v. *Michigan, supra,* at 37.

It should be noted that the absence of federal legislation prohibiting discrimination in employment does not permit the conclusion that there is a national interest in protecting the discriminatory employment practices of persons engaged in interstate commerce. "Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation." *Cities Serv. G. Co.* v. *Peerless O. and G. Co., supra,* at 187, and cases cited therein.

2. *The Colorado Anti-Discrimination Act does not constitute a burden on commerce.*

In discussing the relative weight to be given to national and state concerns, this Court has barred the states from exercising legislative authority "to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co.* v. *Arizona, supra,* at 767. State legislation impeding the "free flow of commerce" has been characterized as "an unconstitutional burden" or an "undue burden" on commerce. *Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, 529 (1959); *Morgan* v. *Virginia,* 328 U. S. 373, 377 (1946).

"Burdens upon commerce" have been defined by this Court as "those actions of a state which directly impair the usefulness of its facilities for such traffic." *Morgan* v. *Virginia, supra,* at 380. No lengthy exposition is required to establish that a state law against discrimination in employment has no adverse effect, directly or indirectly, upon the facilities of commerce by land, water or air. The Colorado Anti-Discrimination Act prohibits employers, including those hiring employees for interstate transportation (such as airplane pilots), from using the irrelevant criteria of race, color, religion or national origin in determining whom to hire for a particular job. The effect of that ban is to widen the recruitment reservoir so that the employer can more easily hire the person best qualified to fill the job, be he white or Negro, Protestant, Catholic or Jew.

Certainly, a state statute which encourages the hiring of airplane pilots solely on the basis of experience and qualifications cannot be deemed a burden on interstate commerce. On the contrary, such a state law tends to promote air traffic and safety by assisting in the recruitment of the best qualified pilots; it requires the removal of restrictions and burdens from commerce insofar as the field of employment is concerned.

In 1963 it is no longer possible to argue that a Negro pilot hired in Colorado to fly a commercial air liner interstate could not, because of his race, land and take off in any state in the United States. No state prohibits the employment of persons because of their race; any state statute, regulation or administrative action attempting to do so would patently violate the Equal Protection Clause of the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1

(1948); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955); *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958); *Bailey* v. *Patterson*, 369 U. S. 31 (1962). Hence, there could be no confusion resulting from conflicting state laws in that respect.

The opinions below rely heavily on *Hall* v. *DeCuir*, 95 U. S. 485 (1878) in which this Court struck down as an unconstitutional burden on interstate commerce a Louisiana statute prohibiting segregation among passengers on boats plying the Mississippi River. In that case, this Court pointed out that the Mississippi River touched ten different states and that if each state were at liberty to regulate the conduct of carriers while within its jurisdiction, "the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship." The Court stated that no carrier of passengers could "conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate." *Hall* v. *DeCuir, supra.* The Louisiana statute was invalidated as imposing "a direct burden on interstate commerce."

That decision of 1878 does not control the case at bar.

First, it deals with a state law prohibiting segregation of passengers, not with a statute prohibiting discrimination in employment. The reasoning of the courts below on the question of interference with commerce arises from a confusion of the problem of discrimination in servicing passengers with that of discrimination in employment. We are in full agreement with *Morgan* v. *Virginia, supra*; *Chance* v. *Lambeth*, 186 F. 2d 879 (1951); *Pryce* v. *Swedish-*

American Lines, 30 F. Supp. 371 (1939); *Fitzgerald* v. *Pan American World Airways, supra,* cited by one or both of the courts below. They teach that state action which discriminates against passengers on interstate carriers constitutes a direct burden on interstate traffic. That is also why Congress in various statutes dealing with interstate carriers has prohibited discriminatory treatment of passengers. (Civil Aeronautics Act, 49 U. S. C. A., Secs. 402(e), 484(b); Federal Aviation Program Act, 49 U. S. C. A. (Supp.), Sec. 1374(b); Interstate Commerce Act, 49 U. S. C. A., Sec. 3(1).)

The second reason that *Hall* v. *DeCuir* is not sound precedent for the case at bar is that it was predicated upon the situation prevailing in the southern states in 1878 —before the Constitution was interpreted to bar state statutes requiring racial segregation. *Brown* v. *Board of Education, supra,* and *Gayle* v. *Browder,* 352 U. S. 903 (1956), overruling *Plessy* v. *Ferguson,* 163 U. S. 537 (1896). Hence, the diversity among state laws in 1878 governing racial segregation of passengers was in fact a burden on commerce. Today, such a diversity of state legislation is impossible. "We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. *Morgan* v. *Virginia* (*supra*); *Gayle* v. *Browder* (*supra*); *Boynton* v. *Com. Virginia,* 364 U. S. 454 (1960) * * *. The question is no longer open; it is foreclosed as a litigable issue." *Bailey* v. *Patterson, supra,* at 33. Hence, a state statute prohibiting segregation on interstate carriers, like the Louisiana statute involved in *Hall* v. *DeCuir,* can not create confusion or constitute a burden on commerce today.

The Supreme Court of Colorado sought to save *Hall* v. *DeCuir* as a viable precedent by referring to *Morgan* v. *Virginia, supra* and *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960), both of which cited *Hall* v. *DeCuir* with approval.

In the *Huron Portland Cement* case this Court upheld a provision of Detroit's smoke abatement code under which a steam vessel engaged in commerce was required to make structural alterations in order to comply with the city's smoke abatement program. This Court cited *Hall* v. *DeCuir* as one of a series of precedents for the proposition that "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary" (362 U. S. at 444), but held that the Detroit measure was not such a burden.

Hall v. *DeCuir* stands for two legal propositions: 1) a state may not impose a burden on interstate commerce in areas where uniformity of regulation is essential; 2) a state law which prohibits racial segregation of passengers in commerce is such a burden when racial segregation is required in the surrounding states. *Hall*, along with many other cases, remains a precedent for the first proposition and it was solely in that context that this Court cited *Hall* in the *Huron Portland Cement* case. However, as authority for the second proposition, *Hall* has been "eroded and devitalized" since surrounding states may no longer require racial segregation of passengers in interstate commerce. *Brown* v. *Board of Education, supra; Gayle* v. *Browder, supra; Morgan* v. *Virginia, supra; Bailey* v. *Patterson, supra.* Yet it was this obsolete aspect of *Hall* v. *DeCuir* which was relied upon by the Supreme Court of Colorado when it held that the Colorado Anti-Discrimina-

tion Act, as applied to Continental, imposed an undue burden on commerce.

Similarly, the Supreme Court of Colorado should have derived little comfort from this Court's citation of *Hall* v. *DeCuir* in *Morgan* v. *Virginia*. *Morgan* cited *Hall* for the proposition that a state statute dealing with segregation of passengers in commerce may not disturb the uniformity required to permit the free flow of passengers in interstate transportation. It was for that reason that the Virginia statute requiring racial segregation on motor carriers was struck down as a burden on commerce. Today, even more so than when *Morgan* v. *Virginia* was decided in 1946, the uniformity required for interstate commerce can be only the uniformity which is implicit in the equality of all people before the law, without regard to race or religion. *Brown* v. *Board of Education, supra; Bailey* v. *Patterson, supra.*

C. The *Corsi* case

In a discussion of the relationship between the congressional powers set forth in Article I, Section 8 and the legislative powers of states, the case of *Railway Mail Association* v. *Corsi, supra*, provides important guidance. That case dealt with the validity, under the federal Constitution, of a New York State law prohibiting racial and religious discrimination by labor unions against applicants for membership. The unanimous opinion of this Court first upheld that statute against the charge that it violated the Due Process Clause of the Fourteenth Amendment. That aspect of the decision has been discussed above on pages 6-8. Next, this Court rejected the argument that the New York statute denied the petitioner (the Railway

Mail Association) the equal protection of the laws by subjecting it to Section 43 of the State Civil Rights Law prohibiting discrimination while denying it, as an organization of federal employees, certain benefits granted other labor organizations under the New York Labor Law. That aspect has no bearing on the case at bar.

Finally, this Court considered the contention that Section 43 is "repugnant to Article I, Section 8, Clause 7 of the federal Constitution which confers on Congress the authority over postal matters; that Section 43 constitutes an invasion of this field over which Congress has exclusive jurisdiction and constitutes an attempt to regulate a federal instrumentality." *Railway Mail Association* v. *Corsi*, *supra*, at 95. Thus, the Railway Mail Association sought to use the Postal Clause of the federal Constitution to invalidate Section 43 just as the courts below sought to use the Commerce Clause in the instant case to invalidate the Colorado Anti-Discrimination Act as applied to hiring practices of interstate carriers.

In rejecting the contention that Section 43 of the New York Civil Rights Law is repugnant to the Postal Clause, this Court discussed both the argument that Section 43 imposed an undue burden on the federal government's postal functions and the argument that the government by federal legislation pre-empted and fully occupied the field regulated by Section 43 of the New York law. Those arguments are closely analogous to the two grounds on which the courts below held the Colorado Anti-Discrimination Act unconstitutional.

Rejecting the undue burden argument, this Court said that:

> The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. *Id.*, at 96.

Turning to the pre-emption argument, this Court examined the provision of 5 U. S. C. A., Sec. 652 which, it was argued, constituted a complete occupation of the field by federal legislation. That provision, as read by the Court, prohibited discrimination against a federal employee based on his membership in an organization of postal employees. The Court said that that provision

> * * * can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. Congress must clearly manifest an intention to regulate for itself activities of its employees which are apart from their governmental duties, before the police power of the state is powerless * * *. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded. *Id.*, at 97.

D. The presumption of constitutionality of state laws

The District Court in its opinion, which was affirmed by the Supreme Court of Colorado, held that under the

Commerce Clause of the Constitution, the Colorado Act prohibiting employment discrimination because of race, creed, color, national origin or ancestry, despite its broad language, "may not constitutionally be extended" to cover employment practices of interstate carriers with respect to flight crew personnel. That decision is a declaration that the Act is unconstitutional to the extent that it requires interstate carriers to refrain from engaging in racial or religious employment discrimination within the state.

Both federal and state courts recognize the existence of a presumption in favor of the constitutionality of a state law. It is long settled that a state law may be invalidated as unconstitutional only if its repugnance to the fundamental law is clear and beyond reasonable doubt. *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940); *Ogden* v. *Saunders*, 12 Wheat 213, 270 (1827).

We have shown that the federal Constitution does not bar the State of Colorado from including in the coverage of its Anti-Discrimination Act discriminatory employment practices of interstate carriers operating within the state. But were that conclusion in doubt, the Act and its applicability to interstate carriers must be upheld under the presumption of constitutionality.

CONCLUSION

The decision of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

BERNARD NATH
Chicago, Illinois
GILBERT GOLDSTEIN
Denver, Colorado
ARNOLD FORSTER
New York, New York
Attorneys for
Anti-Defamation League of B'nai B'rith
515 Madison Avenue
New York 22, New York

ELY M. AARON
Chicago, Illinois
CHARLES ROSENBAUM
Denver, Colorado
EDWIN J. LUKAS
New York, New York
Attorneys for
American Jewish Committee
165 East 56th Street
New York 22, New York

Amici Curiae

PAUL HARTMAN
THEODORE LESKES
SOL RABKIN
New York, New York
Of Counsel

January 11, 1963.